IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. JONATHAN MICHAEL PLOOF, Petitioner.	2 CA-CR 2007-0277-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR200301357

Honorable James H. Keppel, Judge

REVIEW GRANTED; RELIEF DENIED

James P. Walsh, Pinal County Attorney
By Craig Raymond — Florence
Attorneys for Respondent

Thomas J. Phalen — Phoenix
Attorney for Petitioner

E S P I N O S A, Judge.

¶1 Petitioner Jonathan Ploof was convicted after a jury trial of three counts of child molestation and one count each of sexual conduct with a minor and attempted child molestation. This court affirmed the convictions and the sentences imposed on appeal. *State v. Ploof*, 213 Ariz. 284, 141 P.3d 764, *depublished*, 213 Ariz. 598, 146 P.3d 1007 (2006). In this petition for review, Ploof contends the trial court abused its discretion by denying relief without an evidentiary hearing on claims of ineffective assistance of counsel raised in his petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P. Absent a clear abuse of discretion, we will not disturb the trial court's ruling. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 The charges against Ploof arose out of acts he had committed between 1996 and 2002 that involved three victims, S.R., S.T., and J. In addition to the charged offenses, the state alleged Ploof had committed other acts and filed a motion in limine seeking leave to admit evidence of those acts, pursuant to Rule 404(c), Ariz. R. Evid., to establish Ploof's propensity to commit sexually aberrant acts against young girls. After an evidentiary hearing held just before trial, the court permitted the state to introduce evidence about the following acts: while wrestling with J., Ploof had pinned her to the ground and had "looked her up and down"; Ploof had offered J. a pair of his wife's lace underwear; Ploof had looked through a door jamb to watch S.R. change into her swimsuit; and Ploof had stared between S.R.'s legs while they were in his swimming pool. The court precluded the state from

introducing evidence of an incident in which Ploof allegedly had gone into the bathroom while J. showered.

¶3 On appeal, Ploof contended the trial court had erred when it permitted the state to introduce evidence of six other acts, even though (1) the state had only presented evidence of four of the incidents at the pretrial evidentiary hearing, (2) only the four incidents were the subject of the court's order permitting the state to introduce the evidence, and (3) only the four incidents were the subject of the court's instructions to the jury limiting its consideration of the evidence of the other acts. Specifically, Ploof argued J. had been permitted to testify about two incidents that had exceeded the scope of the court's ruling: one in which Ploof had given J. a "piggy-back ride" and had attempted to "brush over [her] vaginal area," and the other involving a "wrestling match" during which Ploof had pinned J. to the ground and had "eyed [her] 'up and down.'"

¶4 We first noted Ploof had failed to object to the admission of the evidence relating to these other acts at trial, nor had he objected when the court instructed the jury. *Ploof*, ¶ 21. Consequently, pursuant to *State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005), we found Ploof had forfeited review of all but fundamental, prejudicial error. *Ploof*, ¶ 21. We then rejected Ploof's argument related to the testimony about the "wrestling match" because, contrary to Ploof's contention, that incident had been included in the court's order based on evidence presented at the evidentiary hearing. *Id*. ¶ 22.

¶5 In his petition for post-conviction relief, Ploof asserted trial counsel had been ineffective for failing to object to the evidence about the wrestling incident. Ploof maintained that, as a result, the incident was not the subject of the motion in limine, was not included in the court's order, and was not subject to the instruction the court gave the jury about how to view the other-act evidence. Ploof argues he was prejudiced by counsel's omission because the court necessarily failed (1) to determine there was clear and convincing evidence he had committed these acts as required by Rule 404(c)(1)(A) and *State v. Terrazas*, 189 Ariz. 580, 582, 944 P.2d 1194, 1196 (1997); (2) to determine whether the other acts were of such a nature that they permitted a reasonable inference Ploof had a propensity to commit sexually aberrant acts and likely had committed the charged sexual offenses, pursuant to Rule 404(c)(1)(B); (3) to determine whether the probative value of the evidence outweighed the potential for unfair prejudice, in accordance with Rule 404(c)(1)(C), relying on *State v. Aguilar*, 209 Ariz. 40, n.11, 97 P.3d 865, 874 n.11 (2004); and (4) to make clear to the jury these acts should be considered in light of the cautionary instruction the court gave with respect to the four incidents it had ruled were admissible.

¶6 In a cursory minute entry, the trial court summarily denied Ploof's request for post-conviction relief. For essentially the same reasons we rejected his claim on appeal that the court had erred in permitting J. to testify about the wrestling incident, we cannot say the court abused its discretion by rejecting Ploof's related claim of ineffective assistance of counsel. To be entitled to relief based on a claim of ineffective assistance, a defendant must

show counsel's performance was deficient, based on prevailing professional norms, and there is a reasonable probability that, but for that deficiency, the outcome of the case would have been different, that is, that the defendant was actually prejudiced by counsel's performance. *See Strickland v. Washington*, 466 U.S. 668, 697 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). A defendant is only entitled to an evidentiary hearing on his petition for post-conviction relief if he has raised a colorable claim. *See State v. Watton*, 164 Ariz. 323, 328, 793 P.2d 80, 85 (1990). A colorable claim is one that, if true, might have changed the outcome of the case. *See State v. Schrock*, 149 Ariz. 433, 441, 719 P.2d 1049, 1057 (1986).

¶7 Ploof did not raise a colorable claim for relief. Even assuming counsel had performed deficiently by not objecting to the evidence, either at the hearing on the state's motion in limine or when the victim testified,[1] Ploof has not shown he was thereby prejudiced. As we noted on appeal, the state had, in fact, presented evidence about the wrestling incident at the evidentiary hearing on the state's motion in limine, and the court had included this incident in its order. *Ploof*, ¶ 22. The court considered the evidence under the appropriate standard, finding as to the other-act evidence it ruled admissible, that the evidence was clear and convincing that the acts had occurred,

[1]At the end of the evidentiary hearing on the state's motion, defense counsel objected to the evidence of other acts, but it is not clear whether his objections were intended to relate to the wrestling incident. At another point, he stated, "I do have an objection to all the other evidence." Thus, he may well have objected, contrary to Ploof's assertion that he failed to do so.

> the acts provide a reasonable basis to infer that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the crimes charged as to said victims[,] [a]nd third, the evidentiary value of that evidence is not substantially outweighed by the danger of unfair prejudice, confusion of issues, or other factors enumerated under Rule 403 of the Rules of Evidence.

¶8 Ploof is correct that the trial court did not mention the wrestling incident when it instructed the jury, but he has not established he was thereby prejudiced. Specifically, Ploof has not established that, but for the lack of an objection, there is a reasonable probability the outcome of the case would have been different. *See Schrock*, 149 Ariz. at 441, 719 P.2d at 1057. This was one incident among a number of others, including the charged acts. And the court did convey to the jury that evidence of uncharged acts had to be clear and convincing before the jury could consider it.

¶9 Ploof also asserted in his Rule 32 petition that trial counsel had been ineffective by failing to object to J.'s testimony about the piggy-back ride. The state apparently had included the piggy-back incident in its motion in limine but did not present evidence about it at the evidentiary hearing. The trial court did not mention the incident in its order granting the state's motion. *Ploof*, ¶ 23. As we pointed out on appeal, J. testified Ploof had offered to give her a "piggy-back ride" and, as he held up her legs, he had tried to "brush over [her] vaginal area." *Id*. ¶ 24. On appeal, we found any error resulting from "this brief, unanticipated testimony" not fundamental or prejudicial. *Id*. We noted the testimony was given "during the second day of a five-day trial, was brief in duration, was

unsolicited by the prosecutor, and there was no further mention of it." *Id*. We concluded, "This evidence covered just one of several other act incidents about which the jury was informed." *Id*. For the same reason, we cannot say the court abused its discretion by denying relief on Ploof's related claim of ineffective assistance of trial counsel. Again, even if counsel had performed deficiently by failing to object when J. testified about the piggy-back-ride incident, Ploof has not established that, but for this deficiency, there is a reasonable probability he would have been acquitted. *See Schrock*, 149 Ariz. at 441, 719 P.2d at 1057. In addition, far from performing deficiently, defense counsel appears to have made a reasoned, tactical decision to question J. about this incident and others in order to impeach her credibility by showing she had not reported them to the detective who had investigated the charges.

¶10 Ploof also contends the trial court abused its discretion by denying relief on his claim that trial counsel had been ineffective in failing to object to the court's failure to enter specific findings required by Rule 404(c)(1)(D). *See Aguilar*, 209 Ariz. 40, ¶ 30, 97 P.3d at 874; *Terrazas*, 189 Ariz. at 582, 944 P.2d at 1196. But, on appeal, we rejected the underlying claim that the court had committed reversible error by failing to make specific findings. *Ploof*, ¶ 15. We concluded that neither the rule nor *Aguilar* mandates reversal of convictions on this basis. *Id.*; *see Aguilar*, 209 Ariz. 40, ¶ 37, 97 P.3d at 875. We noted that, if preserved, the issue would have been reviewed for harmless error, but because Ploof had not objected, we reviewed it for fundamental, prejudicial error. *Ploof*, ¶ 16. We found,

contrary to Ploof's assertion, the court had made specific factual findings about two of the other acts involving J. and had incorporated by reference the second victim's testimony about the two remaining other acts. *Id.* ¶ 17. We disagreed with Ploof that the court had not been sufficiently specific to satisfy Rule 404(c)(1)(A). *Id.* We agreed, however, that the court merely had repeated the language of the remaining two requirements of Rule 404(c)(1)(B) (character trait showing aberrant sexual propensity and evidentiary value outweighing danger of unfair prejudice) and had not satisfied Rule 404(c)(1)(D) or *Aguilar*. *Id.* But, we concluded the error was neither fundamental nor prejudicial and that we had been provided a sufficient basis for examining the propriety of the court's ruling. *Id.* ¶ 18.

¶11 Given our disposition of this issue on appeal, we cannot say the trial court abused its discretion by rejecting the associated claim of ineffective assistance of trial counsel. Even assuming counsel had performed deficiently, we necessarily conclude there is no reasonable probability the outcome at trial or on appeal would have been different. *See State v. Bennett*, 213 Ariz. 562, ¶ 29, 146 P.3d 63, 69 (2006); *State v. Tyrrell*, 152 Ariz 580, 582, 733 P.2d 1163, 1165 (App. 1986). If counsel had objected and the court had entered more specific findings, it still would have ruled correctly in admitting the evidence of these other acts.

¶12 Nor has Ploof established the trial court abused its discretion by denying relief on his claims that counsel was ineffective because he did not request a specific instruction on the meaning of clear-and-convincing evidence, the standard the court correctly told the

jury it must apply before it could consider the evidence of other acts. On appeal, we rejected the underlying claim that the court had erred by failing to define clear and convincing; because Ploof had not objected and had not requested the additional instruction, we reviewed the claim for fundamental error only. *Ploof*, ¶ 25. We implied that it was not reversible error to fail to instruct the jury further based on the general principle that defining instructions are not necessary when the terms involved "are commonly understood by those familiar with the English language." *Id*. ¶ 31, *quoting State v. Valles*, 162 Ariz. 1, 6, 780 P.2d 1049, 1054 (1989). We agreed with Ploof that the limiting instruction the court had given on the use of other-act evidence was an incorrect statement of the law, but we found the error was to Ploof's benefit and did not require reversal. *Id*. ¶ 33. We concluded, "Under the circumstances, . . . the trial court's failing to define 'clear and convincing' and giving an improper limiting instruction do not constitute fundamental error." *Id*.

¶13 For similar reasons, we cannot say the trial court abused its discretion by rejecting Ploof's related claim of ineffective assistance of counsel. Consistent with our decision in Ploof's appeal, we are not persuaded counsel performed deficiently by failing to request the instruction. *See Ulan v. Richtars*, 8 Ariz. App. 351, 356, 446 P.2d 255, 260 (1968) (finding it unnecessary to define terms "clear and convincing"). Even assuming, without deciding, that counsel should have requested an additional instruction defining the terms, Ploof has not established that, if he had and if the instruction had been given, the

outcome of the case would likely have been different. *See Schrock*, 149 Ariz. at 441, 719 P.2d at 1057.

¶14 Likewise, Ploof has not established the trial court abused its discretion by denying relief on his claim that counsel was ineffective because he had failed to object to the instruction on reasonable doubt. We rejected the underlying challenge to the instruction, which was based on the instruction our supreme court adopted in *State v. Portillo*, 182 Ariz. 592, 596, 898 P.2d 970, 974 (1995). *Ploof*, ¶ 43. Counsel cannot have been ineffective for failing to object to an instruction adopted and repeatedly approved by our supreme court. *See Portillo*, 182 Ariz. at 596, 898 P.2d 974; *see also State v. Dann*, 205 Ariz. 557, ¶ 74, 74 P.3d 231, 249-50 (2003); *State v. Lamar*, 205 Ariz. 431, ¶ 49, 72 P.3d 831, 841 (2003); *State v. Van Adams*, 194 Ariz. 408, ¶¶ 29-30, 984 P.2d 16, 25-26 (1999).

¶15 Ploof also contends on review as he did below that trial counsel was ineffective with respect to plea negotiations. Specifically, he asserts trial counsel did not explain to him all the terms of the plea agreement the state had offered in writing. He contends on review that, at a minimum, he raised a colorable claim for relief and was entitled to an evidentiary hearing. But, based on the record before us, Ploof has not sustained his burden of establishing the trial court abused its discretion by denying relief on this claim without an evidentiary hearing.

¶16 On October 15, 2003, prosecutor Bradley Soos sent a letter to defense counsel in which Soos stated Ploof could plead guilty to three counts of attempted child molestation,

offenses for which probation was available. Defense counsel Paul Banales responded with a letter outlining his understanding of the agreement, and Soos responded, stating the offer would remain open until January 15, 2004. Banales sent Ploof this correspondence with a cover letter stating he was enclosing materials relating to Ploof's case. In July 2004, at a hearing on pretrial motions, the trial court conducted a hearing pursuant to *State v. Donald*, 198 Ariz. 406, 10 P.3d 1193 (App. 2000), during which Banales avowed he had received the plea offer and had discussed the terms of the agreement with Ploof "on several occasions" as well as the potential sentencing consequences if he were to be found guilty at trial, and that Ploof had rejected the offer. Ploof attended that hearing but said nothing; he did not dispute Banales's avowals, nor did he challenge the sufficiency of Banales's explanation to him of the terms of the proposed plea agreement.

¶17 Even assuming as true Ploof's insistence that Banales had performed deficiently by not fully explaining the terms of the plea offer or the risks of going to trial, Ploof has not established the trial court abused its discretion in denying post-conviction relief on this basis. Ploof has never denied he received from Banales the correspondence between Banales and Soos. At the *Donald* hearing, before Banales spoke, Soos explained the plea offer in its entirety, including the facts that probation would be available on two of the counts and the parties would stipulate to a lifetime term of probation on the remaining count. In denying post-conviction relief, the court was free to rely on the avowals made by both attorneys as well as on Ploof's silence and implicit concession that he had understood

and rejected the plea offer. In his petition for review and his reply to the state's opposition, Ploof complains that no one asked him whether counsel truly had gone over the plea agreement with him and whether he understood its terms. But he fails to explain why, if he did not agree with counsel's representations, he said nothing at the *Donald* hearing or during the seven months that followed before trial. Nor does he specify what it is he did not understand and whether or how that affected his decision to reject the plea offer. Under the circumstances, Ploof has not established how counsel's purportedly deficient performance was prejudicial. On this record, we cannot say the court abused its discretion by denying relief on this claim.

¶18 We therefore grant the petition for review but, for the reasons stated, we deny relief.

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PHILIP G. ESPINOSA, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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GARYE L. VÁSQUEZ, Judge